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In the Supreme Court  
OF THE  
United States

OCTOBER TERM 1984

THE PRESS-ENTERPRISE COMPANY, a California corporation,  
*Petitioner*,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
FOR THE COUNTY OF RIVERSIDE,  
*Respondent*.

THE PEOPLE OF THE STATE OF CALIFORNIA,  
*Plaintiff*,

vs.

ROBERT RUBANE DIAZ,  
*Defendants*.

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**BRIEF OF AMICI CURIAE IN SUPPORT  
OF PETITION FOR WRIT OF CERTIORARI**

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Filed on Behalf of the Copley Press, Inc.;  
The Associated Press; Los Angeles Times, a division of  
Times Mirror Company; John P. Scripps newspaper group;  
California Freedom of Information Committee;  
San Jose Mercury News; The Sun Co.; San Francisco  
Examiner; California Newspaper Publishers Association,  
Inc.; National Broadcasting Company, Inc. (NBC);  
The Radio & Television News Association of Southern  
California; California Society of Newspaper Editors;  
The East Bay Press Club; Sparks Newspapers;  
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No. 84-1560

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**BRIEF OF AMICI CURIAE IN SUPPORT  
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**STATEMENT OF INTEREST OF AMICI CURIAE**

Amici respectfully submit this Brief of Amici Curiae in support of the petition for a writ of certiorari.<sup>1</sup> Amici regularly report on criminal proceedings throughout California.

<sup>1</sup>Pursuant to Rule 42, the written consent of the parties is filed concurrently with this brief.

### **The Closures Are Frequent and Statewide.**

The deprivation of First Amendment rights Petitioner identifies is not limited to the *People v. Diaz* case<sup>2</sup> nor to the people of Riverside County. Closure of criminal proceedings occurs frequently throughout California, affecting the rights of the public and the press across the state. Since the California Supreme Court has now held, in the *Diaz* case, that the public has *no First Amendment* right to attend criminal preliminary hearings, California trial judges have been closing these criminal proceedings with increasing frequency.

### **The Preliminary Hearing Is a "Critical Stage" of the Criminal Process.**

Such closures cause an immediate and irremediable loss of the public's First Amendment right to attend a "critical stage" of a criminal trial.<sup>3</sup> Issues crucial to the criminal justice process (for example, objections to police misconduct, suppression of evidence, cross-examination of witnesses, confrontation of accusers, application of rules of evidence, impartial judicial presence, right to call defense witnesses, representation by counsel) are part of the preliminary hearing. Repeated statewide closure undermines Amici's ability to fulfill their public responsibility to report on such issues.

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<sup>2</sup>The petition arises from the California Supreme Court decision in *Press-Enterprise Co. v. Superior Court*, 37 Cal.3d 772, 691 P.2d 1026, 209 Cal.Rptr. 360 (1984); the underlying criminal case was *People v. Diaz* (L.A. No. 31876). To avoid confusion between the Court's decision, *Press-Enterprise Co. v. Superior Court*, 464 U.S. \_\_\_, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) and the California Supreme Court decision that is the subject of this petition, Amici will refer to the California case as *Diaz*.

<sup>3</sup>*Hawkins v. Superior Court*, 22 Cal.3d 584, 588, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

### **Only the Court Can Protect the Public's Right.**

Neither the Court's decision in *Press-Enterprise Co. v. Superior Court*, 464 U.S. \_\_\_, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), nor the clear and unanimous statement of the Courts of Appeals<sup>4</sup> that the public has a right to attend pretrial criminal proceedings mean anything in California in the wake of the *Diaz* holding that no First Amendment right of access exists. Because of the *Diaz* decision, Amici and the people of California have no avenue of redress unless the Court grants the petition and hears this case on its merits.

### **The Amici**

The Copley Press, Inc. publishes five daily newspapers in California — *The San Diego Union*, *The Tribune*, *The Daily Breeze*, *The News-Pilot*, and *The Santa Monica Evening Outlook* — whose combined circulation is more than 450,000 copies daily.

The Associated Press is a membership nonprofit corporation organized under the laws of the State of New York. It is a news wire service with the primary purpose of gathering, editing, and transmitting news reports and photographs to its 1,240 member newspapers and its 5,600 member broadcast stations throughout the United States, and to other publishers throughout the world.

*Los Angeles Times*, a division of the Times Mirror Company, is the largest daily newspaper in California, and has a general daily circulation of more than one million copies.

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<sup>4</sup>*Application of the Herald Co.*, 734 F.2d 93 (2d Cir. 1984); *Associated Press v. U.S. Dist. Ct. For C.D. of Cal.*, 705 F.2d 1143 (9th Cir. 1983); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982).

The John P. Scripps newspaper group is an affiliation of locally independent newspapers in California.

California Freedom of Information Committee is a nonprofit organization formed by and representing the journalism profession of California. Its membership consists of working press, both print and broadcast, educators, various press clubs, chapters of the Society of Professional Journalists — Sigma Delta Chi, The California Newspaper Publishers Association, and The California Broadcasters Association. Among its purposes are to represent the public at large on the subject of freedom of information and to protect, on behalf of the public, against all efforts to impose restraints against the flow of information to which the public is entitled.

The *San Jose Mercury News* is a Knight-Ridder newspaper whose circulation covers Santa Clara County and the remaining San Francisco Bay Area.

The Sun Co. of San Bernardino publishes a general circulation newspaper in all portions of San Bernardino County with a total circulation of 80,000 daily.

The *San Francisco Examiner* is a newspaper of general daily circulation in the San Francisco Bay Area and elsewhere in Northern California. Its daily circulation is estimated to be in excess of 150,000 and its readership is substantially larger.

The California Newspaper Publishers Association, Inc., a nonprofit mutual benefit association, comprises a membership of a majority of the state's daily and weekly newspapers of daily circulation.

National Broadcasting Company, Inc. (NBC) provides programming, including news, for broadcast by owned and affiliated television stations throughout the country. NBC's

news department continually covers pretrial and trial proceedings in criminal cases.

The Radio & Television News Association of Southern California is an organization of radio and television stations whose members regularly cover criminal proceedings in California.

The California Society of Newspaper Editors is a professional society of newspaper editors organized to promote professional excellence and dedicated to upholding the First Amendment rights of their members.

The East Bay Press Club is an organization of journalists and editors who brought the first constitutional suit to California Penal Code Section 868 challenging the closure of preliminary hearings.

Sparks Newspapers is a publisher of various daily and weekly newspapers, including *The Daily Review*, *The Argus*, *The Tri-Valley Herald*, and *The San Ramon Valley Herald*.

McClatchy Newspapers is a communications company with seven daily and three nondaily newspapers in California, Washington and Alaska, having a total circulation in excess of 500,000.

Radio-Television News Directors Association NorCal is a nonprofit organization representing news directors in Northern California from the broadcast media.

The *San Francisco Chronicle*, a division of the Chronicle Publishing Co., is a daily newspaper published in San Francisco, California with a daily circulation of 540,000 and a Sunday circulation of 705,625. The Chronicle Broadcasting Co., a wholly owned subsidiary of Chronicle Publishing Co., operates three television stations.

## I

### SUMMARY OF ARGUMENT

#### A. The Problem Affects All of California.

California courts continue to deny the public its right to attend pretrial criminal proceedings in general, and preliminary hearings in particular.<sup>5</sup> The California Supreme Court's decision, *Press-Enterprise Co. v. Superior Court*, 37 Cal.3d at 777, 691 P.2d 1026, 209 Cal.Rptr. 360 (the *Diaz* case), exacerbates the problem by stating that the public has no First Amendment right to attend preliminary hearings.<sup>6</sup> Since *Diaz*, preliminary hearings in California have been routinely closed, often with no evidence of

<sup>5</sup>See *Telegram-Tribune, Inc. v. Municipal Court*, 2d Civ. No. 69594 (Cal. Ct. of App., 2d Dist., Div. Six); *Newberry v. Justice Court of San Benito County*, AO 24819 (Cal. Ct. of App., 1st Dist., Div. Five); *Sacramento Bee v. Municipal Court*, 3 Civ. No. 23658 (Cal. Ct. of App., 3d Dist.); *People v. Sanchez, et al.*, San Diego County, CR No. F77211; *People v. Mack*, San Diego County, CR No. \_\_\_\_.

<sup>6</sup>In spite of this Court's 1984 decision, *Press-Enterprise Co. v. Superior Court*, 464 U.S. \_\_\_, 104 S.Ct. 819, 78 L.Ed.2d 629, the California Supreme Court in the *Diaz* case simply reaffirmed a position taken earlier, *San Jose Mercury-News v. Municipal Court*, 30 Cal.3d 498, 506, 638 P.2d 655, 179 Cal.Rptr. 772 (1982), which held the public had no such First Amendment right. Just six weeks after the *San Jose Mercury-News* decision, the California Legislature responded by amending California Penal Code Section 868, the statute concerning the public's right to attend preliminary hearings, to read that such hearings could only be closed to the public when "necessary in order to protect the defendant's right to a fair and impartial trial. . ." California Penal Code § 868 (operative March 1, 1982) (Deering 1983) (emphasis added). Amici suggest that Penal Code § 868, as amended, if properly applied meets the constitutional safeguards of the First and Sixth Amendments. The California Supreme Court's *Diaz* decision, however, not only vitiates the statutory provision but also creates a standard that abuses First Amendment rights.

prejudice to the defendant's fair trial right, no articulated findings of fact, and based on an unsubstantiated recitation "reasonable likelihood of substantial prejudice."<sup>7</sup>

#### B. The Preliminary Hearing Is a "Critical Stage" of the Criminal Process.

The California Supreme Court has repeatedly stated that the preliminary hearing is a "critical stage" of the criminal process, *Hawkins v. Superior Court*, 22 Cal.3d at 588, 586 P.2d 916, 150 Cal.Rptr. 435, and the preliminary hearing is the only hearing of substance in most criminal cases, *San Jose Mercury-News v. Municipal Court*, 30 Cal.3d at 511, 638 P.2d 655, 179 Cal.Rptr. 772. Nonetheless, the public is routinely excluded.

#### C. Diaz Disregards the Court's Decisions.

The Court has consistently affirmed the public's First Amendment right to observe their judicial system in operation. *Press-Enterprise Co. v. Superior Court*, 464 U.S. \_\_\_, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

*Diaz*, and its application by trial courts, refuses to recognize the clear thrust of these decisions. Because California trial and appellate courts regularly disregard the public's right to attend and the press' responsibility to report criminal preliminary hearings, Amici respectfully request the Court to grant the petition, overturn the California Supreme Court's *Diaz* decision and establish a strict stan-

<sup>7</sup>Cases in which Amici have participated in the four months since the *Diaz* case, in San Diego County alone, in which the preliminary hearing has been closed include: *People v. Lucas*, San Diego County, CR No. F89006; *People v. Troiani*, San Diego County, CR No. H03859.

dard, arising under the First Amendment, to insure the public's right of access to preliminary hearings.

## II

### THE CALIFORNIA SUPREME COURT CONTRADICTS THIS COURT'S DECISIONS.

In the *Richmond Newspapers*, *Globe Newspaper* and *Press-Enterprise* cases, the Court has kept the criminal process open to public scrutiny. In each case, the Court looked to history and policy to conclude that the public has a First Amendment-based right to be present at criminal judicial proceedings.

The history of preliminary hearings in the United States supports open hearings. Most states conduct open preliminary hearings. In only six states, including California, all of which adopted the Field Code, is closure permitted. The Field Code provisions authorizing such closure, however, until recently, have been "in judicial dormancy and day-to-day disuse." Geis, *Preliminary Hearings and the Press*, 8 UCLA L.Rev. 397, 407 (1960-61). Accordingly, even though a few jurisdictions have laws on the books allowing closed preliminary hearings, the practice has been for the hearings to be public. Geis, *Preliminary Hearings and the Press, supra*. Furthermore, in California, after the Court's *Richmond Newspapers* decision, and in response to the California Supreme Court's *San Jose Mercury-News* decision, the California Legislature changed the Field Code provision to permit a preliminary hearing to be closed only when *necessary* in order to protect a defendant's fair trial right. California Penal Code Section 868, as amended 1982 (Deering 1983). The *Diaz* case disregards this legislative mandate.

Policy also supports open preliminary hearings. The Court has acknowledged the importance of public review

of the actions of all branches of government, including all phases of the criminal justice process. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604-606, 102 S.Ct. 2613, 73 L.Ed.2d 248; *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559-561, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

The Court has identified four benefits from criminal proceedings:

1. Public scrutiny improves the quality of the proceeding;
2. Public access increases public understanding of the criminal justice system;
3. Public access fosters public confidence in the system; and
4. Public access contributes to a fuller community catharsis. *Press-Enterprise Co. v. Superior Court*, 464 U.S. —, 104 S.Ct. at 823-824, 78 L.Ed.2d 637-638.

Each applies with equal force to public access to a preliminary hearing. In California, the preliminary hearing is a "critical stage" of the criminal process. *Hawkins v. Superior Court*, 22 Cal.3d at 588, 592-593, 586 P.2d 916, 150 Cal.Rptr. 435. Activities that typically occur at trial also occur at the preliminary hearing; each side has an incentive to prevail; the defendant is represented by counsel, prosecution witnesses are cross-examined; the defendant can call witnesses on his or her behalf; and, all the evidence is heard by a neutral magistrate. The right of public access to the preliminary hearing in California is just as important as the right of public access to trial. In many cases, the public's only opportunity to observe the criminal justice system at work is at the preliminary hearing. The overwhelming number of felony cases are disposed of without trial. *San Jose Mercury-News*, 30 Cal.3d at 511, 638 P.2d 655, 179 Cal.Rptr. 772 citing California Department of Justice, *Crime and Delinquency in California, Part II*, 10.

Public access to the preliminary hearing improves its quality just as public access to trial benefits that process. Public access adds assurance that the proceedings are conducted fairly to all concerned; it discourages perjury, the misconduct of participants, and prevents decisions based on partiality. As the Court recognized, "Without publicity, all other checks are insufficient . . . ." (Citation omitted.) *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 569, 100 S.Ct. 2814, 65 L.Ed.2d 973.

Access to preliminary hearings increases public understanding of the criminal justice system. The public must understand how its system operates; that understanding cannot be realized if the public does not have a constitutionally based right to attend the only hearing that occurs in the vast majority of California felony cases.

Substantial constitutional issues, for example, suppression questions, are decided at the preliminary hearing. Graham and Letwin, *A Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 UCLA L.Rev. 916 944-945 (1971). When preliminary hearings are held behind closed doors, decisions on important constitutional questions are made in secret. At a time when the public is questioning court decisions allowing suppression of evidence, and other constitutional safeguards for criminal defendants, the public has a right to see the application of those safeguards in particular cases.

Preliminary hearings also involve objections to the propriety of police conduct. See California Penal Code Section 1538.5 (Deering supp. 1985). In fact, the preliminary hearing can be the only point in the criminal process at which public conduct is put under public scrutiny. *Richmond Newspapers v. Virginia*, 448 U.S. at 570-573, 100 S.Ct. 2814, 65 L.Ed.2d 973. Because that conduct occurs outside the public view, beneficial public scrutiny never takes place

if access to the preliminary hearing is not given constitutional protection.

Public access to preliminary hearings also fosters public confidence in the system:

"[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise*, 464 U.S. \_\_\_, 104 S.Ct. at 823, 78 L.Ed.2d at 637.

Access to preliminary hearings is as important as access to trial. It enhances public confidence in the criminal justice system by demonstrating that established due process procedures are followed even at the preliminary stages of the criminal case. Furthermore, the fact that closed hearings may be fairly conducted does not enhance the public's confidence in the system if the public is not allowed to see the hearing:

"Secret hearings — though they be scrupulously fair in reality — are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978).

Finally, public access to preliminary hearings creates a community catharsis.

"When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would

deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct ..." *Press-Enterprise*, 464 U.S. \_\_\_, 104 S.Ct. at 823-824, 78 L.Ed.2d at 637.

Because the majority of California criminal cases never result in a public trial, public access to preliminary hearings is important for its community therapeutic value. Thus, all of the analytical underpinnings of the Court's decisions, including *Press-Enterprise*, apply with equal weight to this case.

### III

#### THE DIAZ STANDARD PRACTICALLY GUARANTEES CLOSED PRELIMINARY HEARINGS.

*Diaz* failed to place any real evidentiary burden on a party seeking closure. Indeed, *Diaz* expressly contemplates a magistrate finding a reasonable likelihood of substantial prejudice on mere predictions. *Diaz*, 37 Cal.3d at 782, 691 P.2d 1026, 209 Cal.Rptr. 360. The case holds that the standard it establishes is "a lesser standard than a factual finding of actual prejudice." *Id.* *Diaz* does not require the magistrate to consider alternatives to closure, or to consider whether closure will in fact be effective in the particular case. The case does not even mention the rigorous requirement imposed by the Court, and by Circuit Court decisions, that the basis for a court's closure decision be articulated in findings. *See, e.g., Press-Enterprise*, 464 U.S. \_\_\_, 104 S.Ct. at 824-825, 78 L.Ed.2d at 639; *Application of the Herald Co.*, 734 F.2d 93, 100-101 (2d Cir. 1984); *Associated Press v. U.S. Dist. Ct. For C.D. of Cal.*, 705 F.2d 1143, 1146 (9th Cir. 1983); *United States v. Chagra*, 701 F.2d 354, 361-365 (5th Cir. 1983); *United States v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550, 560-561 (3d Cir. 1982).

As a practical matter, *Diaz* allows magistrates to close preliminary hearings on a mere conclusory statement that a reasonable likelihood of substantial prejudice exists. The public's ability to attend preliminary hearings is left to the unfettered discretion of a magistrate, whose decision to close a hearing is safe from appellate review so long as the magic words are said.<sup>8</sup> By refusing to recognize the public's First Amendment right to attend a critical stage of the criminal process, and by eviscerating the Legislature's attempt to insure open preliminary hearings, *Diaz* practically guarantees routine closures of preliminary hearings. Amici's only avenue of redress is for the Court to overturn *Diaz* and establish a First Amendment-based right of access to such hearings.<sup>9</sup>

### IV

#### CONCLUSION

The right of the public to the free flow of information about the administration of its judicial system is crucial to democratic society:

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<sup>8</sup>The only avenue of appellate redress the public has is by petition for writ of mandate that must establish, among other things, abuse of discretion. Since *Diaz* imposes no effective standards by which that discretion is to be exercised, the burden is impossible. In any event, approximately 90% of all such petitioners are routinely denied. San Diego County Bar Association Appellate Court Committee, *California Appellate Practice Seminar Syllabus*, Appendix A, 16 (1985).

<sup>9</sup>The public in California has no real opportunity to establish a meaningful access right through the Legislature. The amendment to California Penal Code Section 868 providing that hearings can only be closed when "necessary" to protect a defendant's fair trial right was a legislative reaction to the *San Jose Mercury-News* decision. Since *Diaz* reads the word necessary out of Penal Code Section 868, further legislative amendments will provide no meaningful access right.

"Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability." *Nebraska Press Asso. v. Stuart*, 427 U.S. 539, 587, 96 S.Ct. 2791, 49 L.Ed.2d 683 (Brennan J., concurring).

After every preliminary hearing, a person is either bound over for trial or charges are dismissed and the accused returns to society. Important questions inevitably arise about the propriety of the court's decision. Such judicial decisions cannot be allowed to occur in secret. Unless the Court acts to establish a strict standard based on the First Amendment, the public in California will continue to be prohibited access to this critical stage of the criminal process.

DATED: April 26, 1985

Respectfully submitted,

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